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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 328

LESTER C. NEWTON TRUCKING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (264 F. Supp. 869; J.S. App. 72), dismissing appellant's action to set aside an order of the Interstate Commerce Commission (J.S. App. 14, 57) in its Docket No. MC-113388 (Sub-No.

26), *Lester C. Newton Trucking Co. Common Carrier "Grandfather" Application.*[1]

By application filed December 8, 1958, appellant sought "grandfather" authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573, 49 U.S.C. following 303(b)(6)) to transport frozen fruits, berries, and vegetables between various points in an area comprising sixteen eastern States and the District of Columbia. The following year, on November 17, 1959, appellant applied for an extension of its certificate of public convenience and necessity under Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)) to transport the identical commodities between the same points. The applications were heard upon a consolidated record (J.S. App. 3). At the hearing appellant sought a determination that these three commodities were included in the terms of its existing certificates which authorize the transportation of "general commodities," "frozen foods," "agricultural commodities," and "farm produce." After full administrative hearings, the Commission (a) found that appellant was entitled to "grandfather" authority from and to specified points in seven States and the District of Columbia (J.S. App. 32–33); (b) denied appel-

[1] The Commission's report on reconsideration, decided May 19, 1965, also included No. MC–113388 (Sub-No. 27), *Lester C. Newton Trucking Co. Extension—Frozen Fruits, Vegetables, and Berries*, and is officially reported at 98 M.C.C. 702. The original decision of the Commission, dated April 28, 1961, granting the carrier limited authority under its "grandfather" and extended applications, is reported at 84 M.C.C. 758. The subsequent denial by the Commission on reconsideration of the entire extension application, dated May 10, 1962, is reported at 89 M.C.C. 262.

lant's application for a certificate of public convenience and necessity (J.S. App. 51); and (c) found that the terms "agricultural commodities" and "farm produce," as used in appellant's existing certificates, did not authorize the transportation of the frozen fruits, berries, and vegetables (J.S. App. 27–28).

Appellant challenged these orders in the United States District Court for the District of Delaware, which temporarily enjoined them (J.S. App. 60). However, as a result of this Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, the Commission, on its own motion, reopened the proceeding for reconsideration on the existing record, and the district court stayed its proceeding (J.S. App. 60). In its subsequent report on reconsideration, the Commission concluded that, applying the standards established in *Willis Shaw*, appellant was in fact entitled to broader "grandfather" authority than had previously been awarded, and therefore expanded this authority to include service between additional points (J.S. App. 68–69). The Commission affirmed its prior findings as to the other issues (J.S. App. 57–71). Appellant then pursued its action in the district court. A three-judge district court (convened under 28 U.S.C. 2284, 2325), one judge concurring in a separate opinion, sustained the Commission's order and dismissed appellant's complaint (J.S. App. 99–100).

ARGUMENT

This appeal presents no substantial questions warranting plenary consideration by this Court. The legal standards for grants of motor carrier certificates,

whether under a "grandfather" clause or upon proof of public convenience and necessity, as well as their subsequent interpretation, are well settled. There was substantial evidence to support the Commission's application of those standards in the instant case.

1. Determination of the operations which a motor carrier may conduct under a "grandfather" clause, such as that of Section 7(c) of the Transportation Act of 1958, is a function reserved to the Commission. *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489–490. In its report on reconsideration (J.S. App. 62 *et seq.*), the Commission applied the standards which this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, 377 U.S. 159, held to obtain in determining "grandfather" rights to transport frozen fruits, frozen berries and frozen vegetables under the 1958 legislation.[1]

Here the record reveals that the Commission's grant of "grandfather" authority achieved substantial parity with appellant's prior *bona fide* operations. That grant was plainly in compliance with Section 7(c) (see J.S. App. 82–83). In fact, as the court below observed (J.S. App. 92), the Commission, in considering the factors set out in this Court's *Willis Shaw* decision, was

[1] Only last term, this Court summarily affirmed three similar decisions involving the application of Section 7(c) to specific situations. In *Battaglia* v. *United States*, 385 U.S. 115, the Commission had denied in part the motor carrier's application for "grandfather" rights, while in *Ewley Express, Inc.* v. *United States*, 385 U.S. 371, and *Colonial Refrigerated Transportation, Inc.* v. *United States*, 385 U.S. 480, as in this case, the Commission had substantially granted the application.

"rather generous in its grants". That the Commission attached greater weight to certain evidence before it than it did to other evidence does not support appellant's charge that it "ignored all evidence except that of actual past points served" (J.S. 17). In any event, the weighing of evidence before the Commission is not a matter of concern for the courts, so long as substantial evidence supports the result reached. *United States* v. *Carolina Carriers Corp., supra,* 315 U.S. at 489–90; *Alton R. Co.* v. *United States,* 315 U.S. 15, 23. The Commission's evaluation of the evidence supporting its grant (J.S. App. 48–50; 63–66), carefully reviewed by the lower court (J.S. App. 86 *et seq.*), need not again be canvassed by this Court.

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[1] In analyzing the Commission's rationale, the court below stated (J.S. App. 92):

> The Commission adopted an origin territory approach [with respect to shipments within the Middle Atlantic area] rather than an origin points approach. * * * The Commission did not fail to consider the other relevant factors detailed in the *Willis Shaw* decision. With few exceptions, the Commission did in fact base grants of "grandfather" authority upon all the actual shipments Newton introduced into evidence. Even when considered together with Newton's alleged holding out, these exceptions which involved only a few isolated shipments are not sufficient to justify interference with the Commission's denial of further grants of "grandfather" authority here.

Moreover, the court found that with respect to shipments between the Middle Atlantic States, on the one hand, and New England and the Southeast, on the other, the evidence of shipments was either fragmentary, or, in some cases, non-existent, and that, consequently, "the Commission correctly denied any grant of 'grandfather' authority for such transportation" (J.S. App. 94–96).

2. The Commission's denial of appellant's application for extension of its certificates under Section 207 (a) of the Interstate Commerce Act was premised on appellant's failure to establish that the public convenience and necessity required its operations beyond those certificated in the companion "grandfather" proceeding. As the lower court correctly stated (J.S. App. 96), "[a] basic ingredient in the determination of public convenience and necessity is whether the existing facilities are adequate to meet the present or future transportation requirements." See *Curtis, Inc.* v. *United States*, 225 F. Supp. 894, 898 (D. Colo.), affirmed, 378 U.S. 128; *Quickie Transport Co.* v. *United States*, 169 F. Supp. 826, 829 (D. Minn.), affirmed, 361 U.S. 36; *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S.D. N.Y.), affirmed, 336 U.S. 802. Here appellant failed to carry its admitted burden of showing that the existing service was inadequate (J.S. App. 96–97).

Contrary to appellant's assertion (J.S. 17–18), the Commission treated appellant's past operations performed under color of right as a factor to be taken into account in determining the public convenience and necessity (J.S. App. 67–68). Such evidence is of course not dispositive, particularly since the record showed an abundance of satisfactory motor carrier service by existing operators. *Zuesch Truck Line, Inc., Investigation of Permit*, 83 M.C.C. 625, 636–637, sustained *sub nom. Zuesch Truck Line* v. *United States*, 224 F. Supp. 457 (D. Kan.); *Floyd & Beasley Transfer Co., Inc., Extension—Mill Supplies*, 79 M.C.C. 269, 274, sustained *sub nom. Floyd & Beasley Transfer Co.* v. *United States*, 185 F. Supp. 390 (N.D. Ala.). The

Commission is required to exercise informed administrative discretion, considering the wide variety of circumstances which may be involved in specific situations, in determining whether a new certificate should issue. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. That discretion was not improperly exercised here.

3. In regard to the scope of operations that appellant may perform under its outstanding certificates, this Court has held that interpretation of motor carrier certificates is properly left to the Commission (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 178), and that its construction will not be overturned unless clearly erroneous, arbitrary or capricious. *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554; *Noble* v. *United States*, 319 U.S. 88, 93; *National Trailer Convoy, Inc.* v. *United States*, 240 F. Supp. 286, 288 (N.D. Okla.), affirmed, 382 U.S. 40; *W. J. Dillner Transfer Co.* v. *Interstate Commerce Commission*, 193 F. Supp. 823, 825–826 (W.D. Pa.), affirmed, 368 U.S. 6; *Union Cartage Co.* v. *United States*, 193 F. Supp. 645, 646–647 (D. Mass.), affirmed, 368 U.S. 143.

Appellant contends that its existing "agricultural commodities" certificates entitle it to transport frozen fruits, berries and vegetables.[4] It argues (J.S.

[4] Were appellant correct in this contention, its authority under these certificates would relate only to the transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt commodities, since agricultural commodities transported in straight loads are exempted from economic regulations under Section 203(b)(6), and were so prior to the 1958 legislation (see note 6, *infra*.)

9-11, 15-16) that in interpreting its existing certificates to bar such authority, both the Commission and the court below have narrowed its certificates in violation of Section 7(b) of the 1958 Act (72 Stat. 573), a savings clause which preserves pre-existing authority, and Section 212(a) of the Interstate Commerce Act (49 U.S.C. 312(a)), which provides that certificates remain in effect until suspended, changed or revoked after notice and hearing. But this contention disregards the fact, as found by the Commission (J.S. App. 27-28, 63), that it never intended[1] to authorize the transportation of the frozen products in question at the time the "agricultural commodities" certificates were issued. Indeed, in *Newton, Extension of Operations—Frozen Foods*, 43 M.C.C. 787 (1944), appellant was granted "frozen food" authority upon the basis of a finding that the transportation of the three involved commodities was not authorized by its existing "agricultural commodities" certificates. Having acquiesced in this interpretation and grant of authority, appellant cannot now contest that definitive declaration of what rights existed from the very beginning under those certificates. Nor can such an interpretation be equated with modification of existing authority unless the construction of the certificates is so unreasonable as to be clearly erroneous. *Andrew G. Nelson, Inc.* v.

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[1] Where a contrary intent is shown, the carrier would, pursuant to Section 7(b) of the 1958 Act, be authorized to continue to transport such commodities under its pre-existing authority. See *Chesapeake Motor Lines, Inc., Common Carrier "Grain, Feeds" Application*, 89 M.C.C. 237 (1962); see also note 9, *infra*.

United States, supra, 355 U.S. at 558–559, n. 4. That is simply not the case here.[8]

[8] Under Section 203(b)(6) of the original Motor Carrier Act (49 Stat. 544–545), non-manufactured agricultural commodities shipped in straight loads were exempt from regulation. When shipped in mixed loads with non-exempt products, a certificate was required. *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C.A. 5); *Interstate Commerce Commission* v. *Service Trucking Co., Inc.* 186 F. 2d 400 (C.A. 3). The Commission consistently held, however, from 1935 to 1956, that frozen fruits, berries, and vegetables were not within the agricultural commodities exception, because it applied only to non-manufactured items. To transport frozen fruits, berries, and vegetables, therefore, whether in straight or mixed loads, a carrier was required to have a certificate specifically listing these items. In 1956, however, two court decisions held that these commodities were within the Section 203(b)(6) exemption. *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, 352 U.S. 884; *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S.D. Tex.), affirmed, 355 U.S. 6. In Section 7 of the Transportation Act of 1958 (72 Stat. 573), Congress clarified its intention with respect to the meaning of the agricultural commodities exception. Section 7(a) amended Section 203(b)(6) by adopting a previous Commission listing of exempt and non-exempt commodities and by expressly excluding from the exemption frozen fruits, berries, and vegetables. Congress thus affirmed and upheld the Commission's long-standing interpretation. See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 15–17. To avoid any doubt that might be raised as to the effect of the amendment with respect to existing certificates, Congress provided in Section 7(b) that any carrier authorized to transport commodities which were subjected to regulation by the amendment in Section 7(a) could continue to operate without making further application. In Section 7(c) Congress provided that truckers who had previously been carrying items which Section 7(a) made non-exempt were entitled to a grandfather certificate provided they were in *bona fide* operation on May 1, 1958. Since Section 7(a) simply confirmed the Commission's original interpretation of the agricultural commodities exception, the scope of the certificate rights preserved by the savings clause in Section 7(b) are defined and delineated by that interpretation. Nothing in the 1958 Act or its legislative history reflects an in-

In addition, as the court below observed, appellant is precluded by the language and legislative history of Section 7(b) of the 1958 Act from relying on that provision as supporting its authority to transport frozen fruits, berries, and vegetables in mixed loads with non-exempt products under its existing "agricultural commodities" certificates (J.S. App. 79-81).[1]

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tent by Congress to alter the Commission's long-standing view in this regard, or to permit carriers to claim greater rights.

[1] In sustaining the Commission's determination that appellant's "agricultural commodities" certificates do not presently permit it to transport frozen fruits, berries, and vegetables (J.S. App. 81), the court below adopted a rationale somewhat different from, though consistent with, that of the Commission. Pointing out "that the Transportation Act of 1958 was intended to 'overrule' the *Home Transfer* and *Frozen Food* cases which had exempted frozen fruits, berries, and vegetables when carried in straight loads," the district court noted that "[t]here is absolutely no indication that the Act intended to deal with the regulation of otherwise exempt commodities when transported in mixed loads with non-exempt commodities" (*ibid.*). Previously, the court had noted that, to the extent that appellant sought to rely on the "agricultural commodities" certificates to support its continuing to transport frozen fruits, berries, and vegetables in mixed loads with non-exempt commodities (see p. 4, *supra*), Section 7(b) was inapposite and saved nothing, since such service "had not been held to be exempt by the courts but was already regulated prior to the Transportation Act of 1958" (J.S. App. 80). Although the district court found it unnecessary to resolve the issue as to the coverage of appellant's "agricultural commodities" certificates immediately before the effective date of Section 7(b), it did not reject the Commission's approach (see p. 3 and n. 6, *supra*) as erroneous (J.S. App. 79). And, in any event, the district court simply reached the same conclusion as the Commission on another ground (*ibid.*). That [illegible] may be different is beside the point, for the result reached by the district court is plainly correct. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, citing and distinguishing *Helvering* v. *Gowran*, 302 U.S. 238, 245.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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